STATE OF MICHIGAN

COURT OF APPEALS

ANTONIO CRAIG, Minor, by his Next Friend, KIMBERLY CRAIG,

Plaintiff-Appellee,

v

OAKWOOD HOSPITAL and HENRY FORD HOSPITAL, d/b/a HENRY FORD HEALTH SYSTEM,

Defendants-Appellees,

and

ASSOCIATED PHYSICIANS, P.C. and ELIAS G. GENNAOUI,

Defendants-Appellants,

and

AJIT KITTUR, M.D.,

Defendant.

FOR PUBLICATION
February 1, 2002
9:15 a.m.

No. 206642
Wayne Circuit Court
LC No. 94-410338-NH

ANTONIO CRAIG, by his Next Friend, KIMBERLY CRAIG,

Plaintiff-Appellee,

v

OAKWOOD HOSPITAL, ASSOCIATED PHYSICIANS, P.C., and ELIAS G. GENNAOUI, M.D.,

Defendants-Appellees,

No. 206859
Wayne Circuit Court
LC No. 94-410338-NH

and

HENRY FORD HOSPITAL, d/b/a HENRY FORD HEALTH SYSTEM,

Defendant-Appellant,

and

AJIT KITTUR, M.D.,

Defendant.

ANTONIO CRAIG, Minor by his Next Friend, KIMBERLY CRAIG,

Plaintiff-Appellee,

v

No. 206951
Wayne Circuit Court
LC No. 94-410338-NH

OAKWOOD HOSPITAL,

Defendant-Appellant/Cross-Appellee,

and

HENRY FORD HOSPITAL, d/b/a HENRY FORD HEALTH SYSTEM,

Defendant-Appellee/Cross-Appellee,

and

Updated Copy
April 26, 2002

ASSOCIATED PHYSICIANS, P.C., and ELIAS G. GENNAOUI, M.D.,

Defendants-Appellees/Cross-Appellants,

and

AJIT KITTUR, M.D.,

Defendant.

Before: Cooper, P.J., and Sawyer and Owens, JJ.

OWENS, J.

We agree with Judge Cooper's opinion in all respects except for portions of section VII. Specifically, we disagree with the rejection of defendant Oakwood Hospital's challenge to the trial court's denial of its motion for remittitur based on the jury's damages award for plaintiff's lost earning capacity. We affirm in part and reverse in part.

Generally, a trial court may grant a defendant's motion for remittitur if the jury verdict is "excessive," that is, greater than the highest amount that the evidence will support. MCR 2.611(E)(1). An appellate court may not disturb a trial court's decision to deny a motion for remittitur unless it determines that there has been an abuse of discretion. *Palenkas v Beaumont Hosp*, 432 Mich 527, 533; 443 NW2d 354 (1989).

Here, the jury awarded plaintiff, who was born in 1980, $52,000 for lost earning capacity for 1998. In addition, to calculate plaintiff's lost earning capacity for each subsequent year through 2041, the jury added three percent to the previous year's figure to account for inflation. Ultimately, as with any future damages award, the trial court reduced plaintiff's lost earning capacity damages award to its present value: $1,992,138.41.

Defendant Oakwood Hospital moved for remittitur, arguing that the lost earning capacity award should have been reduced to a present value of $967,045 because that was the highest amount supported by the evidence. The $967,045 figure was based on the following testimony of plaintiff's expert witness, Dr. Robert Ancell:

> I looked at certain data that's available to us, government data. It's national data and it's related to race, sex, and also education and from that data I indicated and felt that his previous earning capacity was in the area of nineteen thousand nine hundred and thirty-eight dollars a year [$19,938] to approximately twenty-two thousand seven hundred fifty-four dollars per year [$22,754].

Dr. Ancell opined that "one could reasonably expect him to have an earning capacity of a high school graduate or maybe a little bit more than a high school graduate, based on the educational achievements of his biological parents."

Dr. Ancell also testified that the 1997 starting salary at automobile manufacturing companies in Michigan was about twenty dollars an hour, or approximately $40,000 a year, plus benefits. Dr. Ancell noted that a high school education has become a minimum requirement for obtaining this employment. On the other hand, Dr. Ancell testified that "not everybody that wants" these manufacturing jobs get them because of the competition. Dr. Ancell's testimony was supplemented by the expert testimony of a certified public accountant, Marvin Weinstein, that national data indicated that the value of a benefits package was approximately 31.4 percent of the compensation. Thus, Weinstein opined that the benefits package on the $40,000 a year manufacturing job suggested by Dr. Ancell, would be worth approximately $12,560 a year. As noted above, the jury award plaintiff $52,000 for lost earning capacity for 1998.

In denying defendant Oakwood Hospital's motion for remittitur, the trial court opined as follows:

> There is no evidence this jury was fueled by bias, prejudice or passion. These jurors were all working people and at least one of them was a nurse. They were experienced people who would have a normal understanding of life's problems and blessings.
>
> They sat patiently through a five-week trial which they had been told would only last for two weeks.
>
> The Plaintiff 's case took only four or five trial days and the defense spent more than three times that many days putting on their case . . . .
>
> * * *
>
> This Court will not upset the carefully considered decision of the jury and because I believe reasonable minds could find Antonio's life and the ability to live that life could have a reasonable value of $20.9 million. It is important to note that the jury was not required to find that Antonio could only have achieved the minimum income level stream projected by Dr. Ancell. The jury was free to find that Antonio would go beyond a high school education, complete college, and have a professional working life where he earned many times more money than that projected by Dr. Ancell. The projections were the minimum amounts, not the maximum amounts.

As noted above, the trial court's denial of the remittitur motion is challenged on appeal.[1]

It should initially be noted that the length of the trial is not relevant to a determination that the jury award was not excessive. In fact, the trial court's observation that the jury had to sit for three more weeks than they were originally told the trial would take, and that it was the defendants who caused the trial to be so lengthy, would, if anything, give rise to a concern that the jurors could have become biased against the defendants for the inconvenience defendants caused them. Further, contrary to the trial court's suggestion, no evidence was presented indicating that it was reasonable to conclude that plaintiff would have completed college or pursued a professional career.

Moreover, the trial court erroneously characterized Dr. Ancell's figures as the "minimum" income level stream. Dr. Ancell's testimony suggested that the income range he arrived at for

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[1] In addition, defendants Dr. Elias G. Gennaoui and Associated Physicians, P.C., moved for a new trial, contending that only a new trial would do justice because the jury's verdict could not possibly be satisfied. The trial court denied this motion. A new trial may be granted where the damages award is excessive. MCR 2.611(A)(1)(c) and (d). However, a defendant's ability or inability to satisfy a judgment award is not a proper indicator of excessiveness. See *Palenkas, supra* at 531-533. Thus, the trial court did not err in denying these defendants' motion for a new trial.

plaintiff was based on national *averages* under the reasonable assumption that plaintiff would graduate from high school, and did not correspond to a minimum earning potential. Indeed, the minimum earning capacity for someone with a high school education would be $0, if that person were unwilling or unable to find employment, or perhaps the national minimum wage extrapolated to a full-time work schedule. Presumably, the national data cited by Dr. Ancell included high school graduates who were unemployed and underemployed, as well as those who aspired, successfully, to obtain desirable employment in the automobile-manufacturing sector.

Regardless, Dr. Ancell's testimony was that, in his opinion, plaintiff's lost earning capacity was $19,938 to $22,754 dollars a year. He did not testify that it would be reasonable to assume that plaintiff would gain employment in the automobile-manufacturing sector. Instead, Dr. Ancell's testimony indicated that demand for these jobs exceeds the supply, assuming, of course, that plaintiff would have even wanted to pursue this career path. Dr. Ancell's testimony regarding the automobile-manufacturing jobs was, at most, illustrative of what one specific job might pay a high school graduate.[2] In sum, the evidence was insufficient to support a reasonable factual finding that plaintiff's lost earning capacity for 1998 was $52,000.

However, in the instant matter, there was testimony that it was reasonable to conclude that plaintiff would have graduated from high school. In addition, Dr. Ancell's testimony also suggested that plaintiff may have gone "a little bit" beyond high school. Dr. Ancell, however, did not offer any testimony regarding the earning capacity, if any, for this additional education. Nevertheless, the evidence was certainly sufficient to support a finding that plaintiff's lost earning capacity was at the highest end of Dr. Ancell's earning capacity range for high school graduates. Accordingly, the maximum lost earning capacity award actually supported by the evidence for 1998 was $22,750, plus $7,143.50 (31.4 percent, based on Weinstein's testimony) for benefits, or $29,893.50.

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[2] Unfortunately, when an individual is injured at birth, it is impossible to reliably predict what career path the individual would have followed "but for" the injury. In contrast, it is relatively straightforward to calculate lost earnings when an individual is already employed in a career. Similarly, when an individual is pursuing a specific career or vocation, it may be reasonable to assume that the individual would complete that career path. Even performance in school may be a reasonable indicator that an injured person would have pursued a college education, but for an injury. In other words, as the date of injury moves toward birth along a continuum between birth and employment in a desired career path, it necessarily becomes more difficult to reasonably estimate lost earning capacity.

Indeed, it is certainly possible that any newborn child will overachieve relative to the child's family history and other objective considerations, but it is also possible that any newborn child will go on to underachieve relative to those same factors. Although it is *possible* that an injured person would have become a highly compensated professional athlete, it is also possible that the injured person would have chosen a career path leading to intangible rewards, rather than a career based solely on financial reward. Ultimately, to conclude that a person injured at birth would have followed any particular career path "but for" the injury is the hallmark of "speculation," and it is well established that a plaintiff may not recover tort damages that are speculative or contingent. *Theisen v Knake,* 236 Mich App 249, 258; 599 NW2d 777 (1999).

Consequently, we conclude that the trial court abused its discretion by concluding that the actual jury award for lost earning capacity was not "excessive" pursuant to MCR 2.611(A) and (E), and by denying defendant Oakwood Hospital's motion for remittitur. We remand for an order remitting plaintiff's lost earning capacity for 1998 to $29,893.50.[3]

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

Sawyer, J., concurred.

/s/ Donald S. Owens
/s/ David H. Sawyer

[3] The evidence supported the addition of three percent a year to plaintiff's lost earning capacity to account for inflation, subject, ultimately, to a proper reduction to present value.